In the Supreme Court of the United States

OCTOBER TERM, 1954

No. 549

MICHAEL NUKK, ET AL., PLAINTIFFS-APPELLANTS

v.

EDWARD J. SHAUGHNESSY, DISTRICT DIRECTOR OF THE THIRD DISTRICT OF THE IMMIGRATION AND NATURALIZATION SERVICE OF THE PORT OF NEW YORK, DEFENDANT-APPELLEE

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

MOTION TO AFFIRM

Appellee, pursuant to Rule 16(1)(c) of the Revised Rules of this Court, moves that the order of the district court be affirmed, on the ground that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

This is a direct appeal from an order entered on October 11, 1954, and a judgment thereon entered

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on December 1, 1954, by a district court of three judges, specially constituted pursuant to 28 U. S. C. 2282 and 2284, dismissing appellants' complaints seeking judgments to declare unconstitutional and invalid Section 242(d) of the Immigration and Nationality Act of 1952, 66 Stat. 163, 209 (8 U. S. C. 1252(d)), together with the regulations and orders of supervision issued under the section; to declare the orders of supervision of deportable aliens to be unreasonable and an abuse of power; and to grant injunctive relief against appellee.

STATEMENT

Appellants are all aliens who have been ordered deported because of their membership in the Communist Party. The deportations have not been effected, for a number of reasons. Three of appellants (Gannett, Bittleman, Jones) have been convicted of violations of the Smith Act and this Court has recently denied certiorari to review these convictions. *Flynn et al.* v. *United States,* No. 442, this Term, certiorari denied, January 10, 1955.[1] As to the others, no country has been found which will admit them. Since six months have elapsed subsequent to the final order of deportation, section 242(d) of the Immigration and Nationality Act of 1952 is applicable (8 U. S. C. 1252(d)):

> Any alien, against whom a final order of deportation as defined in subsection (c) heretofore or hereafter issued has been outstanding

[1] After denial of certiorari, bail was revoked as to these appellants and they are now in prison. As to them, the instant cause appears to be moot.

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for more than six months, shall, pending eventual deportation, be subject to supervision under regulations prescribed by the Attorney General. Such regulations shall include provisions which will require any alien subject to supervision (1) to appear from time to time before an immigration officer for identification; (2) to submit, if necessary, to medical and psychiatric examination at the expense of the United States; (3) to give information under oath as to his nationality, circumstances, habits, associations, and activities, and such other information, whether or not related to the foregoing, as the Attorney General may deem fit and proper; and (4) to conform to such reasonable written restrictions on his conduct or activities as are prescribed by the Attorney General in his case. Any alien who shall willfully fail to comply with such regulations, or willfully fail to appear or to give information or submit to medical or psychiatric examination if required, or knowingly give false information in relation to the requirements of such regulations, or knowingly violate a reasonable restriction imposed upon his conduct or activity, shall upon conviction be guilty of a felony, and shall be fined not more than $1,000 or shall be imprisoned not more than one year, or both.

Pursuant to this statute, and regulation 8 C. F. R. 242.3, which follows the statute, each appellant was served with an order of supervision. These orders,

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with minor variations, require each alien to report once each week (subsequently administratively modified to require reporting once each month) to the officer in charge of the Immigration and Naturalization Service in the district; to notify the officer in charge of any change in residence or employment within the district within 48 hours after the change; to apply for permission to change the place of residence from one immigration district to another; in some cases to refrain from traveling outside a radius of 50 miles from Times Square, New York, without written permission; and to report when requested for medical and psychiatric examination and to furnish information. In addition, the alien is required to terminate and remain disassociated from membership in, or support of, any activity in furtherance of the doctrines and policies of the Communist Party or any branch, affiliate, or subdivision thereof, and to refrain from associating with any person, knowing or having reasonable ground to believe that such person is a member of or affiliated with the Party. See Juris. Statement App. 4a-6a. Associating is expressly stated not to apply to members of the alien's family or professional legal counsel if such associations are not used in the furtherance of the doctrines, policies, or activities of the organization.

The respective affidavits of appellants, filed in support of their complaints, recite instances of personal inconvenience and loss of time, and, in some cases, allege that change of employment will be

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caused by the reporting requirements and restrictions on travel. The affidavits do not contain any allegations that appellants made requests for administrative relief with respect to the specific difficulties alleged and they do not disclose the factual basis of the denial, if any, of any request for modification, if any such relief was pursued within the administrative process.

The three-judge court dismissed the complaints on the ground that there was no justiciable controversy between the parties. The court pointed out that appellants had not violated the statute, and that the appellee, the District Director, had neither the power to proceed against appellants for a violation nor had he or anyone else threatened to do so. The court relied upon the refusal of this Court, in *United Public Workers* v. *Mitchell*, 330 U. S. 75, to grant "advisory opinions upon broad claims of rights" (330 U. S. at 89).

ARGUMENT

The questions raised by appellants, not only in challenging the holding of the court below that no actual case or controversy had yet been reached (Juris. Statement 11-19), but also in attacking the statute on its merits (Juris. Statement 20-54), are so unsubstantial as not to need further argument.

1. Whatever questions may have existed before the decisions of this Court in *United Public Workers* v. *Mitchell*, 330 U. S. 75, and *International Long-*

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shoremen's and Warehouse Union v. *Boyd*, 347 U. S. 222, it has now been decided that when a statute imposes restrictions or consequences upon specified conduct, no actual case or controversy sufficient to invoke a judicial test can be built upon a mere desire to act contrary to the restrictions in the future, or on the argument that the restrictions are potentially or hypothetically burdensome and invalid. There must be the actual posing of a controversy in its full and final factual detail, beyond material changes or refinements of position by either party which could well moot the conflict or render judicial intervention unnecessary.

In *United Public Workers* v. *Mitchell, supra*, federal employee citizens alleged that they were being restricted by the Hatch Act as to the basic and well-understood activity of political participation, and a test by violation, if unsuccessful, would have been no less ruinous than such a test in the instant case. In *International Longshoremen's and Warehouse Union* v. *Boyd, supra*, the aliens asserted that they would be subjected to the grave practical consequences of being considered re-entrants if they continued the formerly innocuous activity of working in Alaska in summer. In neither of these cases was there as much question concerning the actual detail of what specific activity was in controversy as there is in the instant case, where the restrictions most complained of by appellants are subject to administrative interpretation and modification (*e.g.*, travel beyond specified limits), and where the record does not show any real effort

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to exhaust the simple administrative remedy of asking modification or clarification where needed.

It is of course true that there can be no relinquishment of the general right to supervise under the statute, and that certain general terms of supervision, such as the duty to report from time to time and to refrain from activities in support of the Communist Party, will not be abrogated. But any real question as to what is prohibited, as distinguished from the extreme hypothetical situations repeatedly posed by appellants, is subject to clarification in the context of specific facts and cannot properly be judged at this time on the basis of facile generalities. *Eccles* v. *Peoples Bank*, 333 U. S. 426, 432, 435. The decisions of this Court make it clear that the judicial branch of the Government is not to provide an advance advisory service as to whether persons shall or shall not obey the enactments of the legislative branch, particularly where there may never be an occasion to disobey. The courts have constitutional authority only to protect persons actually and immediately affected by the penalties of invalid legislation. No sanctions have been set in motion against appellants, nor is it even alleged that sanctions have been threatened. From all aspects, their claims are premature.

2. Even if, as appellants argue (Juris. Statement 11-25), there is a right of review at this time under the Administrative Procedure Act (60 Stat. 237, 243, c. 324, Sec. 10; 5 U.S.C. 1009) or otherwise, it is clear that such review could relate only to the basic general issue of whether there can be *any* super-

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vision at all of aliens found deportable but whose deportation has not been effectuated within six months after issuance of the final order. The Procedure Act is expressly inapplicable to "agency action * * * committed to agency discretion" and therefore would not authorize review of the details of supervision committed to the discretion of the agency. Moreover, no statute should be read as attempting to grant jurisdiction in contravention of the constitutional limitation of jurisdiction (Const., Art. III, Sec. 2) to cases and controversies. And, as discussed above, the detailed effect of the supervision orders has clearly not reached the degree of concreteness which would ground a true case or controversy as to those details. Particularly is this so in light of the fact that appellee has no powers of enforcement and that any violation of the statute must be proved to be "willful".

Since, therefore, even if a controversy should be deemed to exist, the only question which could be open at this time would be the general right of supervision, the order of the district court dismissing the complaints may properly be affirmed summarily. There can be no serious question of the power of Congress to require some supervision of the aliens here involved. These are aliens who have been found to be subject to expulsion. They are here only because it has not proved possible to deport them. Thus, although theoretically they should no longer be here, Congress had to face the practical situation that many of them will actually be here for considerable periods of time. Congress

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has developed a reasonable and practical solution for this practical problem. It has decreed that the aliens shall not be kept in detention indefinitely but shall be subject to such supervision as will tend to insure their deportability when that can be effected and also to prevent the freedom thus granted from being used to the detriment of the internal security of the United States. In *Carlson* v. *Landon,* 342 U. S. 524, this Court held that Congress had power to authorize actual detention of aliens not yet determined to be deportable, and that, in exercising the power so conferred, the Attorney General could properly consider the danger that such aliens would engage in activities detrimental to the United States. An alien does not become less dangerous to the United States when he has finally been ordered deported and definitely knows that the United States no longer wants him.

Appellants' whole argument ignores this central fact that they are in a very special class whose distinct status merits special treatment. They are not aliens whom the United States has accepted as part of the general population; they are a group of aliens who have, after full hearings, been found to be undesirable residents of the United States who should be removed but who remain here only because it has proved impossible to deport them. The restrictions are imposed not because appellants are aliens (Juris. Statement 38-41), but because they are aliens found to be deportable. Appellants speak as if the requirement of deportation, because currently impeded, is to be deemed concluded, and

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as if the possibility of deportees disappearing into the general population unless carefully checked was unheard of, especially in the case of members of the Communist Party. The special status of appellants as deportable aliens who have not yet been deported manifestly justifies some form of special treatment. And the treatment specified by Congress, which is not full detention but is not yet full and absolute freedom, is clearly reasonable. Supervision which is in many ways less burdensome than that normally imposed on members of the armed forces cannot be equated to the imprisonment and hard labor provision of *Wong Wing* v. *United States*, 163 U. S. 228. It does not become "punishment" merely because appellants choose to call it such (see Juris. Statement 32-38).[2] It remains supervision, akin not only to parole, probation, or bail, but also to the requirements imposed by many civilized countries on all aliens in their midst.

The *Carlson* case (342 U. S. at pp. 542-544) is a complete answer to appellants' contention that the statute on its face is unconstitutionally vague and indefinite and an unlawful delegation of legislative power (Juris. Statement 41-54). As this Court there said, at p. 542, "It is familiar law that in such an examination the entire Act is to be looked at and the meaning of the words determined by their surroundings and connections." Considering the lim-

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[2] Typical of appellants' exaggeration which results in a false posing of issues is their characterization of the requirement that they not travel beyond fifty miles without permission as "house arrest" (Juris. Statement 35).

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ited class of aliens to which Section 242(d) applies, the standards and limitations of the supervisory power are clear. The supervisory regulations must relate to the self-evident dual purpose of the legislation: (i) to assure that the aliens under order of deportation are promptly available for the carrying out of the deportation orders as soon as that becomes possible, and (ii) to prevent the aliens, whose lack of any remaining stake in the United States differentiates them from citizens and from other alien residents, from using their freedom to the detriment of the United States. As the *Carlson* case points out, 342 U. S. at 542:

> Congress can only legislate so far as is reasonable and practicable, and must leave to executive officers the authority to accomplish its purpose. Congress need not make specific standards for each subsidiary executive action in carrying out a policy.

Like the bail provision in the *Carlson* case, the supervisory provision here applies to several classes of aliens. Some may be dangerous to the United States because they have shown criminal tendencies. The group represented by appellants, like the *Carlson* group, is dangerous because of activities in support of an organization which has been found to threaten the internal security of the United States. As in the *Carlson* case (at p. 543), a "wide range of discretion in the Attorney General" is required "to meet the varying situations" which may arise, but

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the purpose and policy of the regulation is nevertheless clear.

Equally without merit is appellants' argument that the statute is invalid because it attaches consequences to acts of persons in a status (*i. e.* deportability) which was established in an administrative proceeding. (Juris. Statement 20-32.) The law is replete with instances in which a status is established administratively. Such legislation is not invalid *ab initio* merely because certain crimes peculiarly associated with that status may later rest indirectly upon the administrative determination. The selective service legislation, for example, is not to be invalidated merely because the thousands of draft classifications are not first established by jury trial, although a later refusal to comply with requirements of the classification may result in criminal prosecution. See *Cox* v. *United States,* 332 U. S. 442, 453-455.[3] Appellants do not contest the validity of the deportation orders, review of which they could have sought while they were held in custody. We do not even have here the problem, which the dissenting opinion in *United States* v. *Spector,* 343 U. S. 169, 174-180, raises, of whether, in a criminal prosecution for violation of the conditions of supervision, appellants would have an additional right to contest the validity of the deportation order. The only issue is whether, on the basis of the finding of deportability, appellants can be subject to reasonable regu-

[3] Compare, also, price control and public utility legislation and many forms of licensing.

lation based upon the status of deportability. Clearly they can, just as a draft registrant classified 1-A can be ordered to report for induction.

The error in appellants' reasoning rests on a misinterpretation of the decision in *Wong Wing* v. *United States*, 163 U. S. 228, on which they rely so heavily. The *Wong Wing* case did not relate to a statute prescribing precautionary and regulatory restrictions with respect to deportees, but to one which made the mere entry of an order of unlawful residence an automatic and immediate imposition of imprisonment "and infamous punishment at hard labor" (163 U. S. at 235). There is a clear and fundamental difference between an administrative finding automatically imposing punishment, and a group of provisions, as in the instant case, imposing reasonable regulations and providing for imprisonment only if there is a judgment in a criminal trial that such regulations have been willfully violated.[4]

3. While, for the reasons set forth above, we believe that the specific details of the orders of supervision are not now open for determination, it should be noted that once the power to supervise is established there can be no substantial question of

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[4] Similarly, the argument that "a bill of attainder and ex post facto law" is involved (Juris. Statement, 22-25), completely overlooks the fact that no punishment for past acts is here enacted, but only for future violations, if any, of the regulatory provisions. To the extent that appellants base their argument on the fact that deportability has been found because of membership in the Communist Party, they are merely attempting to reargue issues determined against them in *Galvan* v. *Press*, 347 U.S. 522.

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the reasonableness of the requirements specified in the orders directed to appellants.

It is manifestly reasonable to require some reporting by aliens subject to supervision, particularly since they would have a motive to endeavor to conceal their identity and fade into the general population. The requirement for reporting once each week has been changed to once each month, and, with the closing of Ellis Island, the reporting is to the central location of the District Headquarters of the Immigration and Naturalization Service, at 70 Columbus Avenue in the heart of New York. As to the requirements that the alien notify of his change of residence in the district and that he obtain permission before changing to another district, the justification for such requirements as a method of keeping informed is self-evident. Cf. the general provisions requiring registration of aliens (Immigration and Nationality Act of 1952, Secs. 262-266, 8 U. S. C. 1302-1306). There is not and can be no allegation that permission to change has been or will be arbitrarily denied. The requirement that permission be obtained to travel outside of a radius of fifty miles is merely another precaution designed to assure that the alien remains identified and subject to supervision by the office with the duty to supervise. Appellants do not assert that reasonable applications have been denied or will be denied in the future. In fact, in an affidavit by an attorney for the Immigration Service filed in the district court on appellants' application for a stay, it was stated that one of the appellants made application

for leave to travel to a distant resort for health purposes and the application was immediately granted.

Similarly, since the right to supervise must exist, it is reasonable to require the persons subject to supervision to answer questions which will tend to show whether the various provisions are being obeyed. Appellants assert that the questioning may go far afield, but that speculative assertion clearly raises issues which were not before the court below and are not before this Court on this appeal. The order of supervision merely refers to the furnishing of "such information as may be deemed fit and proper". The possibility that some irrelevant questions may be asked does not show that there should not be any right to ask questions at all.

As to the requirement that appellants disassociate themselves from the Communist Party and its activities, the answer is plain; if an alien may be expelled for membership in the party (see *Galvan* v. *Press*, 347 U. S. 522), it is reasonable to provide that those whom it has proved impossible to expel should be prevented from using that circumstance to carry on the very activities which have caused Congress to order their expulsion. Appellants argue that in some cases this condition means loss of their former and more advantageous means of livelihood since they are employed by the Communist Party. But appellants could not have continued in their positions if they had been deported in accordance with law. In accommodating the theory of deportation to the practical difficulties

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presented by the present world situation, Congress cannot be required to assure an alien ordered deported of permission to live here on exactly the same terms as he did before the order of expulsion, when his previous way of life involved activities found to be detrimental to the United States which supply the reason for his expulsion.

The ban on associations with Communists is of the same character, *i. e.*, to assure that the freedom occasioned by the difficulties in carrying out deportation will not be used to the detriment of the United States. Association is expressly defined as *not* including association with family and legal counsel. Again, appellants conjure up possibilities of interpretation which are not presented by the broadside attack on the whole theory of supervision presented by the instant complaints. The reasonableness of any particular interpretation can be dealt with as it arises (cf. *Eccles* v. *People's Bank,* 333 U. S. 426, 432-435), and in this connection it should be reiterated that the statute requires that violations of the provisions must be willful to be criminal. Appellants do not show present injury by conjuring up possibilities of some difficulty that does not now exist and may never occur. All the general conditions of supervision are reasonable and valid in themselves.

In short, even if the restrictions are judged in their present form, without allowance for the obvious further possibility of administrative remedy in amelioration of various provisions, there is no present part of the statute, regulations, or orders

which fails to bear a sufficient, reasonable, and lawful relation to the powers and duties of the Congress and the executive branch, as well as to the necessities intrinsic in the case of aliens awaiting deportation and the particular problem raised by aliens such as appellants in relation to national security and subversion.

CONCLUSION

It is therefore respectfully submitted that, since no actual case or controversy has been presented and since even the theoretical arguments pose no sufficiently substantial question, the judgment of the court below should be affirmed without further briefs or argument.

SIMON E. SOBELOFF,
Solicitor General.

JANUARY, 1955.

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